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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1421

108

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE
E. NELSON,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

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COURT OF CLAIMS**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled causes.

Opinion Below

The opinion of the Court of Claims was entered on December 2, 1946, and is reported in 68 F. Supp. 966.

Jurisdiction

The judgment of the Court of Claims was entered on December 2, 1946. Plaintiffs' motion for a new trial was overruled by the Court of Claims on March 3, 1947, and this petition was filed in less than three months after said date. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement

These cases involve actions by government employees for overtime compensation at one and one-half times the regular rate because of overtime employment. The petitioners believe that the decision of the Court below is in conflict with the judicial pronouncements of this Honorable Court in *Armour & Co. v. Wantock*, 323 U. S. 126, and *Skidmore v. Swift & Co.*, 323 U. S. 134, both decided December 4, 1944, dealing with the overtime pay of fire fighters.

There is in issue here the interpretation and application of the Federal Overtime Pay Acts covering government employees generally, with certain exceptions and limitations. These Statutes have not heretofore been construed by this Court in any proceeding, and the questions at issue here are important in the administration of such laws.

The petitioners were civilian employees of the United States Government, under Civil Service, with salaries fixed on an annual basis, employed as civilian fire fighters by the War Department at the United States Army Air Base at Gulfport, Mississippi.

The petitioner, Albert F. Conn, began work as such on September 24, 1942; the petitioner, Robert D. Flynt, on February 17, 1944; and the petitioner, Willie E. Nelson, on July 17, 1943, and they were so employed continuously through June 30, 1945.

During the periods material herein, the petitioners worked under a regular scheduled tour, fixed by the War Department, of 24 consecutive hours on duty followed by 24 consecutive hours off duty, averaging 84 hours of duty per week.

The petitioners seek to recover overtime pay at time and one-half the regular rate on the basis of 84 hours of employment per administrative workweek, or 44 hours of overtime in excess of 40 hours per week, or in the alternative, such overtime pay as is right and proper under the applicable Acts and the facts and circumstances of these cases.

The decision of the Court of Claims, however, denies them overtime compensation at time and one-half for the periods prior to January 1, 1945 upon the erroneous theory that their hours of employment prior to that date were "intermittent or irregular." This decision premised as it is upon the Court's conclusion that a regularly scheduled workweek becomes "intermittent" or "irregular" employment when it includes certain hours of standby duty, is all the more patently erroneous when it is considered that the Civil Service Commission and the War Department (the agencies charged with administration in the present cases) both repudiated this interpretation nearly two and one-half years ago and have since that time adopted and applied a view basically identical with that of the petitioners.

The governing statutes providing for the payment of overtime compensation at one and one-half times the regular rate for employment in excess of 40 hours per administrative workweek are Senate Joint Resolution No. 170, 77th Congress, approved December 22, 1942 (Public Law No. 821, 56 Stat. 1068), which was in effect during the period from December 1, 1942 to April 30, 1943, inclusive, and the War Overtime Pay Act of 1943, approved May 7, 1943 (57 Stat. 75), which was in effect during the period from May 1,

1943 to June 30, 1945, inclusive, which Acts are set forth in the Appendix hereto.

The petitioner, Albert F. Conn., was only paid an amount equal to 10 per centum of his basic compensation in lieu of overtime pay at time and one-half the regular rate for the period December 1, 1942 to June 30, 1943, during which period he was regularly on duty 24 hours each alternate day (Finding 23(a)).

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, were only paid \$300.00 per annum, or 15 per centum of their basic compensation, whichever was higher, in lieu of overtime pay at time and one-half the regular rate during the period July 1, 1944 to December 31, 1944, during which period they were also regularly on duty 24 hours each alternate day (Findings 23(a), 24(a), and 25(a)).

During the aforesaid periods between December 1, 1942 and December 31, 1944, when overtime pay at time and one-half the regular rate was denied, the petitioners were classified by the War Department as employees whose hours of duty were intermittent or irregular. The petitioners earnestly believe that such classification was erroneous, and at variance with the plain meaning of the words, "intermittent or irregular", and the uncontested fact that the petitioners' hours of duty were 24 each alternate day, regularly and uninterruptedly, over long periods of time (Findings 18, 20, 22, 23, 24 and 25).

The petitioners' view is supported by the report of the Commissioner of the Court of Claims (filed June 13, 1946), reading in part as follows:

"22. At no time during the periods covered by these claims were the hours of duty of either of the plaintiffs intermittent, irregular or less than full time. * * *"
(Finding 22).

In view of the decisions of this Court in *Armour & Co. v. Wantock*, and *Skidmore v. Swift & Co.*, *supra*, both decided December 4, 1944, dealing with overtime pay of firefighters, the Civil Service Commission on January 20, 1945, issued Departmental Circular No. 24, eliminating the option, which departments and agencies had under former regulations, of treating occupations whose regular tours of duty include stand-by or on-call time as falling either under the \$300 or the 15 per centum pay increase formula of Section 3(a) of the War Overtime Pay Act, or under the overtime pay provisions of Section 2 of the Act, and including within the administrative workweek for overtime pay purposes all stand-by or on-call time in a regularly scheduled tour of duty except that allowed for sleep and meals (Finding 12).

On January 25, 1945, the War Department issued Civilian Personnel Circular No. 13, whereby effective January 1, 1945, firefighters working the 24-hour shift were to be considered working 16 hours within the spread of each 24 hours daily tour of duty, and were to be paid overtime compensation accordingly. The issuance of this circular was made necessary by the amendment which the Civil Service Commission made to its War Overtime Pay Regulations to accord with *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co.*, *supra* (Finding 13).

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, were paid overtime compensation at time and one-half the regular rate for 16 hours of overtime per week for the period January 1, 1945 to June 30, 1945, but the War Department did not so compensate the petitioners for the periods prior to January 1, 1945 (Findings 23, 24 and 25).

The War Department used two classes of firefighters at the Gulfport Field, viz., "structural" firefighters with the principal duty of fighting fires in buildings, and "crash" firefighters with the principal duty of fighting fires in

planes. The petitioner, Albert F. Conn, was a "structural" firefighter for part of the period involved herein, and a "crash" firefighter for the balance of the time. The Gulfport Field was in active use for the training of combat crews in heavy bombardment and there was flying at the base, day and night. There were five fire stations at the base but two of these were closed down in 1943. The equipment at the "crash" station, known as Station No. 5, consisted of one large water truck, two small water trucks, one Cardox truck which carried carbon dioxide, and miscellaneous firefighting equipment (Findings 14, 15, 16 and 17).

During the periods for which the petitioners claim overtime compensation, their hours of duty were from 6:00 p. m. to 6:00 p. m. on each 24-hour tour of duty. They were required to sign a time sheet at the time of entering and at the time of leaving duty. They were required to remain on the alert and in readiness at all times, day or night, to respond to fire alarms sent to their station or perform other duties. The petitioners were not permitted to leave the base at any time during their 24-hour tour of duty and were required to remain at or within 50 feet of their station at all times, except when ordered elsewhere in the performance of their duties. They were not allowed to leave the fire station for meals and their food was prepared and served there by one of the firefighters. There were two meals served daily, breakfast and lunch. No recreational equipment was provided for their use and the firefighters were not allowed to engage in any games or other recreation during their tours of duty (Finding 18). There was only one shift of firefighters on duty each 24 hours; no relief crew was held in reserve (Finding 15). The hours from 10:00 p. m. to 6:00 a. m., each day, were designated as the rest period at petitioners' fire station, subject to the firefighters being called out at any time if a fire occurred or threatened

during that period, or for the performance of other duties (Finding 21).

The petitioners were required to be on duty the entire 24 hours, and performed substantial activities between the hours of 10:00 p. m. to 6:00 a. m. which were designated as the rest period. Once or twice each week the crew at Station No. 5 spent from 12 to 18 hours converting blocks of dry ice into liquid carbon dioxide for use in the Cardox truck and the chemical fire extinguishers, and this required the attention of the men engaged on such work during the entire night. They were also required to perform watch duty during the rest period, and there were times during such period when they were called out on drills. The firefighters at Station No. 5 made a substantial number of runs in response to fire alarms during the so-called rest period. The length of time they were away from the station on a firefighting assignment varied from 5 minutes to as much as 6 hours (Findings 19, 21 and 22). The petitioners' activities during the so-called rest period were substantial, whereas in *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co., supra*, the firefighters were only required to respond to alarms, which were rare.

It is an interesting fact in these cases that the petitioners, while members of the "crash" crew, had 8-hour tours of duty six days a week in the period between July 1, 1943 and June 30, 1944, and were paid overtime accordingly. When the War Department on July 1, 1944, changed petitioners' tours of duty back to the two-platoon system, consisting of 24 hours on duty followed by 24 hours off duty, there was no change in pay to compensate for the increase in the hours of duty (R. 20, Findings 16, 23, 24 and 25). It appears that the petitioners actually suffered a loss in pay when their hours of duty were increased from 48 per week to an average of 84 per week. Time and one-half for the additional 8 hours per week results in greater overtime pay

than the compensation in lieu of overtime pay of either \$300.00 or 15 per centum of the basic annual compensation. By increasing the hours of duty from 48 to an average of 84 per week, a reduction in pay was effected, and the Government thereby also saved the cost of an entire crew, as two crews operated Station No. 5 instead of three formerly employed.

Questions Presented

1. Were the petitioners' hours of employment for the periods prior to January 1, 1945 either "intermittent" or "irregular" when it appears that they continuously worked under a regular scheduled tour, fixed by the War Department, of 24 consecutive hours of duty followed by 24 consecutive hours off duty? The petitioners' hours of employment were the same for the period January 1, 1945 to June 30, 1945, but for such subsequent period, they were not treated as intermittent or irregular employees and were paid overtime at time and one-half for 16 hours per week.

2. Are the petitioners entitled to overtime compensation at time and one-half the regular rate for all hours of duty in excess of 40 per administrative workweek for the periods in question when they were on duty 24 hours each alternate day, under the applicable Overtime Pay Acts?

3. In the alternative, are the hours from 10:00 p.m. to 6:00 a.m., designated for rest and meals, to be excluded in arriving at the overtime per workweek, for the periods in question?

4. In the further alternative, how many hours, if any, are to be excluded for rest and meals under the facts and circumstances of these cases in arriving at the overtime per workweek, for the periods in question?

5. When the petitioners were on duty 24 hours each alternate day, what were their hours of employment within the

meaning of the term "employment" as used in the applicable Overtime Pay Acts?¹

6. Is the time during which the petitioners were on leave (sick or annual) with pay to be excluded or deducted for overtime pay purposes? The Court below answered this question in the negative.

7. Doesn't the petitioners' waiting time, stand-by time and on-call time during the 24 hours on duty, constitute "employment" time within the meaning of that term as used in the applicable Overtime Pay Acts, in the same manner as was held in *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co.*, *supra*?

8. In calculating the petitioners' "regular rate of compensation," for overtime pay purposes, is (a) the annual basic compensation to be divided by 52 to ascertain the weekly rate, and the weekly rate divided by 40, the number of hours in a normal workweek, to ascertain the regular hourly rate, which is in harmony with *United States v. Townsley*, 323 U. S. 557, as the petitioners contend, or is (b) the annual rate to be divided by 360 to ascertain the daily rate, and the daily rate divided by 8 to ascertain the regular hourly rate, as the respondent contends?

Statutes Involved

The pertinent statutory provisions will be found in the Appendix attached hereto.

¹ In Finding 16 of the Commissioner's report (filed June 13, 1946), it is stated in part as follows:

" . . . During the entire period covered by their claims, plaintiffs were each working under this system, and their hours of employment consisted of 24 hours on duty followed by 24 hours off duty, thus completing for each plaintiff a total of 168 hours of duty in each bi-weekly period or an average of 84 hours per week. . . ."

Specification of Errors to Be Urged

The Court below erred:

1. In holding that overtime compensation at one and one-half times the regular hourly rate was not payable to the petitioner, Albert F. Conn, for the periods from December 1, 1942 to June 30, 1943, and from July 1, 1944 to June 30, 1945, and to the petitioners, Robert D. Flynt and Willie E. Nelson, for the period from July 1, 1944 to June 30, 1945, under Senate Joint Resolution 170, Public Law No. 821 of December 22, 1942 (56 Stat. 1068), effective December 1, 1942, and the War Overtime Pay Act of 1943 (57 Stat. 75), effective May 1, 1943, for all hours of duty performed by them in excess of 40 hours per administrative workweek in such periods, and in failing to hold that such overtime compensation is payable. (Findings 23(c), 24(c) and 25(c)).

2. In the alternative, in holding that overtime compensation at one and one-half times the regular hourly rate was not payable to the petitioner, Albert F. Conn, for the periods from December 1, 1942 to June 30, 1943, and from July 1, 1944 to December 31, 1944, and to the petitioners, Robert D. Flynt and Willie E. Nelson, for the period from July 1, 1944 to December 31, 1944, under the terms of the said 1942 and 1943 Acts, on the same basis as that used by the War Department, *i.e.*, that they actually worked 16 hours within the spread of each 24-hour period of their tours of duty, after excluding 8 hours designated for rest and meals, without deduction for leave, etc., in computing their overtime pay from January 1, 1945 to June 30, 1945, and in failing to hold that such overtime compensation is payable. (Findings 23(e), 24(e) and 25(e)).

3. In the further alternative, in holding that overtime compensation at one and one-half times the regular hourly

rate was not payable to the petitioner, Albert F. Conn, for the periods from December 1, 1942 to June 30, 1943, and from July 1, 1944 to December 31, 1944, and to the petitioners, Robert D. Flynt and Willie E. Nelson, for the period from July 1, 1944 to December 31, 1944, under the terms of the said 1942 and 1943 Acts, on the basis that they actually worked 16 hours within the spread of each 24-hour period of their tours of duty, after excluding 8 hours designated for rest and meals, and deducting leave, etc., and in failing to hold that such overtime compensation is payable. (Findings 23(d), 24(d) and 25(d)).

4. In failing to hold that for the periods involved the entire 24 hours on duty each alternate day under the facts and circumstances of these cases constituted "employment" within the meaning of that term as used in the applicable Acts; in the alternative, in failing to hold that for the periods prior to January 1, 1945, 16 hours within the spread of each 24 hours on duty constituted "employment," excluding 8 hours designated for rest and meals, on the same basis as that used by the War Department commencing January 1, 1945; and in the further alternative, in failing to allow such overtime compensation as is right and proper under the applicable Acts.

5. In holding that for the periods prior to January 1, 1945, when the petitioners' hours of duty were 24 each alternate day, the petitioners were classifiable as employees whose hours of duty were intermittent or irregular, and in failing to classify them as entitled to overtime compensation at time and one-half the regular rate for such periods, in the same manner as they were classified after January 1, 1945.

6. In holding that in calculating the petitioners' "regular rate of compensation," for overtime pay purposes, the

annual basic compensation is to be divided by 360 to ascertain the daily rate, and the daily rate divided by 8 to ascertain the regular hourly rate, and in failing to hold that the annual basic compensation is to be divided by 52 to ascertain the weekly rate, and the weekly rate divided by 40 to ascertain the regular hourly rate.

7. In failing to hold that the petitioners' waiting time, stand-by time and/or on-call time constituted "employment," within the meaning of that term as used in the applicable Acts.

8. In entering judgments dismissing the petitions.

9. In overruling petitioners' motion for new trial.

Reasons for Granting the Writ

1. The decision of the Court of Claims is in direct conflict with the judicial pronouncements of this Honorable Court in *Armour & Co. v. Wantock*, 323 U. S. 125, and *Skidmore v. Swift & Co.*, 323 U. S. 134, both decided December 4, 1944, dealing with overtime pay of firefighters under the Fair Labor Standards Act. In *Armour & Co. v. Wantock*, *supra*, Mr. Justice Jackson, who delivered the unanimous opinion of the Court, stated in part as follows: (p. 133)

"Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

"That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In *Missouri, K. & T. R. Co. v. United States*, 231 US 112, 119, 58 L. Ed. 144, 147, 34 S. Ct. 26, the Court held that inactive time was to be counted in applying a federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court, said, 'In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait.' "

In both *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co.*, *supra*, it was recognized that waiting time or stand-by time was to be counted as employment time. In each of these cases, a certain period was designated for rest, and the firefighters were only required to respond to alarms during such period on rare occasions. In the instant cases under consideration here, the petitioners were required to perform substantial duties during the so-called rest period.

After this Court announced its decisions in *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co.*, *supra*, the Civil Service Commission revised its regulations eliminating the option which departments and agencies previously exercised of paying employees whose regular tours of duty included stand-by or on-call time \$300.00 or 15% of their base pay under Section 3(a) of the War Overtime Pay Act, or overtime pay at time and one-half under Section 2 of the Act. The Commission recognized the impropriety of classifying employees with a regular tour of duty of 24 hours each alternate day as employees whose hours of duty

were intermittent or irregular. The change in the regulations was made to correct the previous erroneous classification, which inflicted a serious injustice. To quote the language of the Commission in support of the change, "This is in accord with two recent decisions of the Supreme Court of the United States dealing with a similar situation in industry under the Fair Labor Standards Act. *Armour and Co. vs. Wantock and Smith*; *Skidmore vs. Swift and Co.*; both decided December 4, 1944." (Finding 12).

The War Department, pursuant to the revised regulations of the Civil Service Commission, began effective January 1, 1945, paying for 16 hours of each 24 hours on duty. (Finding 13). The petitioners worked an average of $3\frac{1}{2}$ shifts of 24 hours each per week, and $3\frac{1}{2}$ times 16 hours was established as the compensable workweek of 56 hours.

In these cases, there was no long-continued, consistent administrative practice, by published regulations or orders, and repeated reenactments by Congress in the face of such practice. The departments and agencies have no authority to change the law by regulations or orders, and the Civil Service Commission cannot give departments or agencies options to do so. The intent of Congress in the enactment of the Overtime Pay Acts is not changeable by regulations or orders.

When the War Department established an average workweek of 84 hours in lieu of 48 hours, with no increase in pay to compensate for the extra hours, a serious injustice was imposed, and the petitioners earnestly feel that this was contrary to the policy of Congress in the enactment of the Overtime Pay Acts. Time and one-half for 8 of the 48 hours results in greater compensation than the amounts paid in lieu of overtime compensation when the hours of duty averaged 84 per workweek.

2. The decision of the Court of Claims is in direct conflict with *Rokeby v. Day & Zimmerman*, (C.C.A. 8), 157 F. 2d 734, decided November 8, 1946; *Bowers v. Remington Rand*, (C.C.A. 7), 159 F. 2d 114, decided December 10, 1946, and *Bell v. Porter*, (C.C.A. 7), 159 F. 2d 117, decided December 10, 1946, in each of which cases the firefighters were paid for 16 hours of each 24 consecutive hours on duty. The Government in the cases under consideration here did not pay the petitioners for 16 hours of each 24 consecutive hours on duty for the period prior to January 1, 1945.

There is no substantial difference between the cases here and those decided under the Fair Labor Standards Act, except that here the petitioners were required to perform substantial duties during the so-called rest period, they were not permitted to indulge in recreational activities such as cards, games, etc., as the firefighters in the aforesaid decided cases had a right to do, and they were only permitted to rest during the so-called rest period when there was an opportunity to rest.

Under the Fair Labor Standards Act, an employer, who fails to pay overtime which is due, is liable for time and one-half, liquidated damages in an amount equal to such sum, and attorney's fee, and the Government enforces the policy of that Act. The Federal Overtime Pay Acts applying to Federal employees contain no such impositions against the Government, but nevertheless the Government should by its standards of observance of the law set a pattern of fair dealing for private citizens to follow. If the Government does not pay its firefighters time and one-half where they are on duty 24 consecutive hours each alternate day, why should private industry be forced to do so?

Mr. Edgar B. Young of the Bureau of the Budget in his testimony before the Sub-Committee of the House Civil Service Committee, in support of the overtime pay legisla-

tion for Federal employees, (February 24-25-26, 1943), stated in part as follows:

"Mr. REES. From what you have suggested, you are attempting to comply with what is known as the Fair Labor Standards Act, is that correct? Is that what you mean?

"Mr. YOUNG. We are accepting the Fair Labor Standards Act as the established policy of the nation with respect to basic workweek and to compensation for employment in excess of the 40-hour basic workweek."

The petitioners here who were required to spend 24 hours on duty at their post of duty, and devote their entire time to the service of the defendant, were in no sense intermittent or irregular employees. The Government does have employees with intermittent or irregular hours of duty, but that classification does not apply to the petitioners here.

3. The decision of the Court of Claims holding that in the calculation of the regular rate of pay the annual salary is to be divided by 360 to ascertain the daily rate, and the daily rate divided by 8 to ascertain the regular hourly rate, which is to be multiplied by one and one-half to arrive at the hourly overtime rate, is in conflict with the method of calculation used in *United States v. Townsley*, 323 U. S. 557.

4. In pay suits by Federal employees in the District Courts of the United States, the Department of Justice has urged that the Court of Claims has sole jurisdiction. If the Department of Justice is correct in this view, the questions here presented can only be settled by issuing the writ to the Court of Claims.

5. The Court of Claims has decided in these cases questions of substance and importance in the administration

of the Federal Overtime Pay Acts, which, with certain exceptions and limitations, apply generally to all Federal employees. The decision herein will affect a substantial group of civilian firefighters who worked for the War Department in various parts of the country under the two-platoon system, which system is still in use by the War Department.

This Honorable Court has heretofore recognized the importance of questions decided by the Court of Claims in suits for overtime pay by the issuance of the writ in *United States v. Meyers*, 320 U. S. 561, decided January 3, 1944, affecting a large group of Government customs inspectors, and *United States v. Townsley*, 323 U. S. 557, decided January 15, 1945, affecting Government employees of the Canal Zone.

The congressional policy to compensate civilian employees for hours of employment in excess of 40 hours in any administrative workweek is reflected by the language of the Act, and this policy may not be thwarted by the adoption of orders or regulations which are designed to give employees something less than the full benefit of the Act. The wisdom of the policy to pay overtime compensation is a matter strictly within the province of Congress. *Glass City Bank v. United States*, decided November 13, 1945, 90 L. Ed. 72; *Markham v. Cabell*, decided December 10, 1945, 90 L. Ed. 168; *United States v. American Union Transport*, decided February 25, 1946, 90 L. Ed. 507; *North American Co. v. Securities and E. Com.*, decided April 1, 1946, 90 L. Ed. 737. The petitioners earnestly believe that an injustice has been inflicted upon them, and that the same should be remedied by this Court. If the overtime hours amounted to 44 hours per week or 2,288 hours for the year of 52 weeks, the pay increase in the case of a firefighter having an annual salary of \$1,620 would amount to about

119%, if the correct method of computing overtime compensation is to divide the annual salary by 360 to ascertain the daily rate and divide the daily rate by 8 to ascertain the regular hourly rate. Such an increase is in harmony with the Congressional purpose because the overtime hours are in excess of 100% of the normal workweek and Congress provided for time and one-half for the excess hours. The War Department's revised regulations following *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co.*, *supra*, attribute 16 hours per week of overtime to the firefighters. If this is the correct rule to be applied to the period prior to January 1, 1945, the pay increase would amount to approximately 43%. Take as an illustration the case of a firefighter with an annual base salary of \$1620. If the formula prescribed by the Court is used, his hourly wage appears to be 56¢; time and one-half on this basis would produce 84¢ per hour. If a firefighter worked a full year, he would accumulate about 832 hours of overtime per year if the overtime hours per week are considered to be 16, and at 84¢ an hour the additional compensation would amount to \$698.88 in lieu of the \$300 flat salary increase received by him prior to January 1, 1945. Since his basic salary was \$1620 he would thus have received a pay increase of approximately 43% as contrasted with the 21 $\frac{2}{3}$ % which the Court says was the Congressional goal in the overtime pay statutes involved. If the firefighters' workweek is considered to be 56 hours, of which 16 hours were overtime, there is an actual increase in recognizable working hours of 40%. It is certainly not a shocking thing and could scarcely be said to have been foreign to the Congressional intent to give the statutes here involved a construction which would produce a pay increase of 43% based upon a new standard of measuring hours of employment

which increased such hours in the case of firefighters by 40%. Viewed from a slightly different angle it appears that the administrative workweek for government employees in general was increased during the war by Executive Order from 40 to 48 hours, or an increase in the workweek of 20%. To compensate for that, Congress increased pay for government workers an average of $21\frac{2}{3}\%$. It is felt, however, that since in the instant cases the period designated for rest was subject to repeated interruptions for manufacturing carbon dioxide, responding to fire alarms, stand-by service, drills, and other duties, and were not permitted to indulge in any recreational activities, the treatment of the entire 24 hours on duty as hours of employment would seem warranted.

The War Department still has in its employ civilian firefighters working under the two-platoon system of 24 consecutive hours on duty followed by 24 consecutive hours off duty. The Federal Employees Pay Act of 1945, approved June 30, 1945, 59 Stat. 295, which is not involved here because the periods in question are governed by the prior Acts, uses the language, "all hours of employment * * * in excess of forty hours in any administrative workweek * * *." That Act expressly provides for dividing the per annum rate by 2,080, comprising of 52 weeks of 40 hours each, to ascertain the basic hourly rate of compensation, whereas in the cases under consideration here, by dividing the annual salary by 360 to ascertain the daily rate and dividing the daily rate by 8, as urged by the Government, the per annum rate is in effect divided by 2,880, whereas there are only 2,080 hours in a normal work year, and if this view is correct, the petitioners, even if they recover, will not secure the benefit of true time and one-half. The petitioners should be accorded such justice as is permissible under the law, and in harmony with the same.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

Respectfully submitted,

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May 1947.

APPENDIX

The Pertinent Statutory Provisions

The Joint Resolution approved December 22, 1942, Public Law 821-77th Congress, Chapter 798-2d Session, S. J. Res. 170, 56 Stat. 1068, c. 798, applicable to the period December 1, 1942 to April 30, 1943, inclusive, provided as follows:

The joint resolution entitled "Joint resolution extending the period for which overtime rates of compensation may be paid under certain Acts," approved July 3, 1942, is amended by striking out "November 30, 1942," and inserting "April 30, 1943": *Provided*, That the authorization contained herein to pay overtime compensation to certain groups of employees is hereby extended, effective December 1, 1942, to all civilian employees in or under the United States Government, including Government-owned or controlled organizations (except employees in the legislative and judicial branches), and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended: *Provided further*, That such extension shall not apply to (a) those whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, (b) elected officials, (c) heads of departments, independent establishments and agencies, and (d) employees outside the continental limits of the United States, including Alaska, who are paid in accordance with local prevailing native wage rates for the area in which employed: *Provided further*, That overtime compensation authorized herein and under the Act approved February 10, 1942 (Public Law Numbered 450, Seventy-seventh Congress), and section 4 of the Act approved May 2, 1941 (Public Law Numbered 46, Seventy-seventh Congress), as amended, shall be payable only on that part of an employee's basic compen-

sation not in excess of \$2,900 per annum, and each such employee shall be paid only such overtime compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of \$5,000 per annum: *And provided further*, That officers or employees whose compensation is based on mileage, postal receipts, fees, piecework, or other than a time period basis or whose hours of duty are intermittent, irregular, or less than full time, substitute employees whose compensation is based upon a rate per hour or per day, and employees in or under the legislative and judicial branches, shall be paid additional compensation, in lieu of the overtime compensation authorized herein, amounting to 10 per centum of so much of their earned basic compensation as is not in excess of a rate of \$2,900 per annum, and each such employee shall be paid only such additional compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of \$5,000 per annum.

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Sec. 4. This joint resolution shall take effect as of December 1, 1942, and shall terminate on April 30, 1943 or such earlier date as the Congress by concurrent resolution may prescribe.

Senate Joint Resolution 170, set forth above, referred to certain acts approved July 3, 1942, and thereby incorporated therein by reference the Act approved June 28, 1940 (54 Stat. 676); the Act approved October 21, 1940 (54 Stat. 1205); and the Act approved June 3, 1941 (55 Stat. 241).

Joint Resolution approved October 2, 1942, Public Law 728-77th Congress, Chapter 577-2d Session, H. J. Res. 346, 56 Stat. 765, extending for two months the period for which overtime rates of compensation may be paid under the Acts of June 28, 1940 (54 Stat. 676), October 21, 1940 (54 Stat. 1205), and June 3, 1941 (55 Stat. 241), provided as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That the joint resolution entitled "Joint resolution extending the period for which overtime rates of compensation may be paid under certain Acts," approved July 3, 1942, is amended by striking out "September 30, 1942" and inserting "November 30, 1942."

Joint Resolution approved July 3, 1942, Public Law 652-77th Congress, Chapter 482-2d Session, H. J. Res. 329, 56 Stat. 645, extending the period for which overtime rates of compensation may be paid under certain Acts, provided as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions for the payment of overtime rates of compensation contained in the Act approved June 28, 1940 (54 Stat. 676); the Act approved October 21, 1940 (54 Stat. 1205); and the Act approved June 3, 1941 (55 Stat. 241), are hereby extended from June 30, 1942, to and including September 30, 1942.

The Act approved June 28, 1940, Public No. 671-76th Congress, Chapter 440-3d Session, H. R. 9822, 54 Stat. 676, to expedite national defense, and for other purposes, insofar as pertinent, provided as follows:

Sec. 5. (a) Notwithstanding the provisions of any other law, the regular working hours of the Navy Department and the Coast Guard and their field services shall be eight hours a day or forty hours per week during the period of the national emergency declared by the President on September 8, 1939, to exist: *Provided*, That under such regulations as the head of the Department concerned may prescribe, and where additional employees cannot be obtained to meet the exigencies of the situation, these hours may be exceeded: *Provided, further*, That compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate shall be paid only to monthly, per diem, hourly, and piecework employees, whose wages are

set by the Act of July 16, 1862 (12 Stat. 587), as amended or modified; and also to professional and sub-professional employees and to blueprinters, photostat and rotaprint operators, inspectors, supervisory planners and estimators, and supervisory progressmen, and assistants to shop and plant superintendents of the CAF service, as defined by the Classification Act of March 4, 1923 (42 Stat. 1488, U. S. C. 5, ch. 13), as amended: *Provided further*, That in determining the overtime compensation of per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of their respective per annum salaries: *Provided further*, That the President is authorized to suspend, in whole or in part, for the War and Navy Departments and for the Coast Guard and their field services, during the period of the National Emergency declared by him on September 8, 1939, to exist, the provisions of the Act of March 3, 1931 (46 Stat. 1482; U. S. C. 5, 26 (a)), if in his judgment such course is necessary in the interest of national defense, and any regulations issued pursuant to the Act of March 14, 1936 (49 Stat. 1161; U. S. C. Supp. V, title 5, Sec. 29 (a)), may be modified accordingly: *And provided further*, That notwithstanding the provisions of any other law, the President is hereby authorized, in his discretion, to prescribe regulations to establish such uniformity among the War and Navy Departments and the Coast Guard and their field services in regard to hours of work and compensation for overtime of their civilian employees as he may deem necessary in the interest of national defense.

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The Act Approved October 21, 1940, Public No. 873-76th Congress, Chapter 903-3rd Session, S. 4208, 54 Stat. 1205, establishing overtime rates for compensation for employees of the field services of the War Department, and the field services of the Panama Canal, and for other purposes, provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That notwithstanding the provisions of any other law, compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate is hereby authorized to be paid at such places and to such monthly, per diem, hourly, and piecework employees of the field services of the War Department and the field services of the Panama Canal whose wages are set by wage boards or other wage fixing authorities, and also to professional and subprofessional employees, and to blueprinters, photostat and rotaprint operators, inspectors, storekeepers, toolkeepers, and shop superintendents of the CAF service, as defined by the Classification Act of March 4, 1923 (42 Stat. 1488; 5 U. S. C. ch. 13), as amended, as shall be designated from time to time by the Secretary of War or the Governor of the Panama Canal, as the case may be, and the Secretary of War and the Governor of the Panama Canal are authorized to prescribe for their respective services, regulations for overtime employment for said employees or any of them: *Provided*, That in determining the overtime compensation of the foregoing per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of their respective per annum salaries.

The Act approved June 3, 1941, Public Law 100-77th Congress, Chapter 168-1st Session, S. 1541, 55 Stat. 241, authorizing overtime rates of compensation for certain per annum employees of the field services of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, and providing additional pay for employees who forego their vacations, insofar as pertinent, provided in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That compensation for employment in excess of forty hours in any administrative workweek computed at a rate of one and one-half times the regu-

lar rate is hereby authorized to be paid, under such regulations as the President may prescribe, to those per annum employees in the field service of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, whose overtime services are essential to and directly connected with the expeditious prosecution of the overtime work upon which the employees enumerated in section 5 (a) of the Act of June 28, 1940, and section 1 of the Act of October 21, 1940, are engaged: *Provided*, That in determining the overtime compensation of the foregoing per annum employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of the respective per annum salaries.

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Sec. 4. The provisions of this Act shall be effective during the national emergency declared by the President on September 8, 1939, to exist, and shall terminate June 30, 1942, unless the Congress shall otherwise provide.

The War Overtime Pay Act of 1943 (57 Stat. 75), approved May 7, 1943, applicable to the period May 1, 1943 to June 30, 1945, inclusive, insofar as pertinent, provided as follows:

This Act shall apply to all civilian officers and employees (including officers and employees whose wages are fixed on a monthly or yearly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, except those in or under the Government Printing Office or the Tennessee Valley Authority) in or under the United States Government, including Government-owned or controlled corporations, and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended, except that this Act shall not apply to (a) elected officials; (b) judges; (c) heads of departments, independent establishments, and agencies; (d) officers and

employees in the field service of the Post Office Department; (e) employees whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose; (f) employees outside the continental limits of the United States, including Alaska, who are paid in accordance with local prevailing native wage rates for the area in which employed; (g) officers and employees of the Inland Waterways Corporation; and (h) individuals to whom the provisions of section 1 (a) of the Act entitled "An Act to amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes," approved March 24, 1943 (Public Law Numbered 17, Seventy-eighth Congress), are applicable. As used in this section the term "elected officials" shall not include officers elected by the Senate or House of Representatives who are not members of either body.

Sec. 2. Officers and employees to whom this Act applies and who are not entitled to additional compensation under section 3 shall be paid overtime compensation computed on the same basis as the overtime compensation which was authorized to be paid under Public Law Number 821, Seventy-seventh Congress: *Provided*, That such overtime compensation shall be paid only on the portion of an officer's or employee's basic rate of compensation not in excess of \$2,900 per annum: *Provided further*, That such overtime compensation shall be paid on such portion of an officer's or employee's basic rate of compensation notwithstanding the fact that such payments will cause his aggregate compensation to exceed a rate of \$5,000 per annum. . . .

Sec. 3. (a) Except as provided in subsection (c), officers and employees to whom this Act applies and whose hours of duty are intermittent or irregular, officers and employees in or under the legislative and judicial branches (except those in the Library of Congress, or the Botanic Garden, and per annum employees

in or under the Office of the Architect of the Capitol who are regularly required to work not less than forty-eight hours per week) to whom this Act applies, and, subject to the approval of the Civil Service Commission, officers and employees whose hours of work are governed by those of private establishments which they serve and for whom on this account overtime work schedules are not feasible, shall be paid, in lieu of the overtime compensation authorized under section 2 of this Act, additional compensation at the rate of (1) \$300 per annum if their earned basic compensation is at a rate of less than \$2,000 per annum, or (2) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of \$2,900 per annum if their earned basic compensation is at a rate of \$2,000 per annum or more.

(b) Any officer or employee to whom this Act applies and who is entitled to no additional compensation under subsection (a) or subsection (c) for a pay period, shall be paid for such pay period, in lieu of overtime compensation under section 2, additional compensation at the rate of \$300 per annum, unless his overtime compensation under section 2 for such pay period is at least equal to such additional compensation.

(c) Any officer or employee to whom this Act applies and whose hours of duty are less than full time, or whose compensation is based upon other than a time period basis shall be paid, in lieu of overtime compensation or additional compensation under the foregoing provisions of this Act, additional compensation at a rate of 15 per centum of so much of their earned basic compensation as is not in excess of a rate of \$2,900 per annum.

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Sec. 9. The Civil Service Commission is authorized and directed to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration of the provisions of the foregoing sections of this Act insofar

as such provisions affect employees in or under the executive branch of the Government.

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Sec. 14. This Act shall take effect on May 1, 1943, and shall terminate on June 30, 1945, or such earlier date as the Congress by concurrent resolution may prescribe.

(821)